

¹ This same section is commonly referred to as Section 215 of the USA PATRIOT Act. We refer to this section as Section 501 of FISA here and in our proposed brief because it was amendments to Section 501, enacted after Section 215 of the USA PATRIOT ACT, that introduced much of the relevant statutory language into the United States Code.

preliminary injunction that the plaintiffs-appellants have a substantial likelihood of success on the merits of their claim.

In support of this motion, the Center states the following:

1. The Center is a project of the National Security Archive Fund, Inc., a tax-exempt organization. Founded in 1974, the Center is dedicated to the defense of civil liberties, human rights, and constitutional limits on government power. A principal concern of the Center is the prevention of illegal government surveillance.

2. The Center's proposed amicus brief will argue that Section 501 of FISA, 50 U.S.C. § 1861, does not authorize the bulk collection by the National Security Agency ("NSA") of metadata on the calls, including local calls, of virtually all Americans. In particular, the Center's proposed brief will argue that the bulk collection program violates several provisions of Section 501, and that contrary to the government's argument below and elsewhere, Congress did not ratify the program when it extended the sunset of Section 501 in 2011. The Center recently filed a brief on this issue with the Foreign Intelligence Surveillance Court ("FISC" or FISA Court").² The Center's brief will be helpful to the Court in

² The brief is available on the FISA Court's electronic docket:
<http://www.uscourts.gov/uscourts/courts/fisc/misc-14-01-brief-140404.pdf>.

analyzing the language of Section 501 and other FISA provisions, as well as the history and legal effect of the 2011 sunset extension.

3. Counsel for the Government has indicated that the Government consents to the Center's participation as *amicus curiae*. However, the Plaintiffs have not responded to the Center's emailed requests for their consent to participate.

4. Before the district court, Plaintiffs sought a preliminary injunction against the program on both statutory and constitutional grounds. The district court held that it lacked jurisdiction to consider Plaintiffs' argument that the program violates Section 501. *See Klayman v. Obama*, No. 13-0851, slip op. at 23-31 (D.D.C. Dec. 16, 2013). However, the court determined that it was able to reach the merits of Plaintiffs' constitutional claim, and held that the program violates the Fourth Amendment. *Id.* at 42-64. Accordingly, the court found that the Plaintiffs had established a substantial likelihood of success on the merits on their constitutional claim, as well as the other requirements for a preliminary injunction, and entered an injunction pending appeal. *Id.* at 35-68.

5. The Center is aware that on February 10, 2014, Plaintiffs filed a Third Amended Complaint omitting the statutory arguments under Section 501 that Plaintiffs had included in their previous complaints. *See Third Amended Complaint, Klayman v. Obama*, No. 13-cv-00851 (D.D.C. Feb. 10, 2014), ECF No. 77. The Center recognizes that Plaintiffs may be withdrawing their statutory

claims, and that the parties may intend to brief before this Court only the constitutional basis for the District Court's holding.

6. It would be highly questionable, and contrary to the canon of constitutional avoidance, for the Court to grapple with difficult constitutional questions that might be avoided if it first determined whether Congress authorized the program. *See Boos v. Barry*, 485 U.S. 312, 331 (1988). This Court should affirm the district court's holding that Plaintiffs have established substantial likelihood of success on the merits, but on the alternative statutory ground that the program violates Section 501.

Based on the foregoing, the Center respectfully requests that the Court grant its motion for leave to participate as *amicus curiae*.

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**CERTIFICATE OF *AMICUS CURIAE* AS TO
PARTIES, RULINGS AND RELATED CASES**

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), the Center submits this Certificate of *Amicus Curiae* as an addendum to its Motion For Leave to Participate as *Amicus Curiae*:

A. Parties and Amici. Plaintiffs-Appellees-Cross-Appellants are Larry Elliot Klayman, Charles Strange and Mary Ann Strange.

Plaintiffs-Appellees are Michael Ferrari and Matt Garrison.

Defendants-Appellees are Facebook, Mark Zuckerberg, Google, Inc. Larry Page, YouTube LLC, Salar Kamangar, Apple, Inc., Timothy Cook, Microsoft Corporation, Steve Ballmer, Skype, Tony Bates, America Online, Inc., Tim Armstrong, Marissa Meyer, Palalk, Jason Katz, AT&T, Inc., Randall L. Stephenson, Spring Communications Co. and Daniel Hessee.

Defendants-Appellants-Cross-Appellees are Barack Hussein Obama, Eric. H. Holder, Jr., Keith Alexander, Lowell C. McAdams, National Security Agency, United States Department of Justice, Roger Vinson and Verizon Communications Inc.

B. Ruling Under Review. Defendants-Appellants appeal the Order, with associated Memorandum Opinion, granting Plaintiffs' Motion for Preliminary Injunction as to plaintiffs Larry Klayman and Charles Strange, issued by the United States District Court for the District of Columbia, Judge Richard J. Leon.,

on December 16, 2013. *See Klayman v. Obama*, No. 13-cv-00851, slip op. (D.D.C. Dec. 16, 2013), ECF No. 49; *Klayman v. Obama*, No. 13-cv-00881, slip op. (D.D.C. Dec. 16, 2013), ECF No. 41. Plaintiffs-Appellees-Cross-Appellants appeal the same Order denying Plaintiffs' Motion for Preliminary Injunction as to plaintiff Mary Ann Strange. The associated Opinion is available at *Klayman v. Obama*, No. 13-cv-00851, slip op. (D.D.C. Dec. 16, 2013), ECF No. 48; *Klayman v. Obama*, No. 13-cv-00881, slip op. (D.D.C. Dec. 16, 2013), ECF No. 40.

C. Related Cases. Plaintiffs filed two related actions in the district court, nos. 13-cv-00851 and 13-cv-00881. Presently before this Court are four appeals, representing the appeals and cross-appeals filed from those two district court actions: nos. 14-5004 (Defendants' appeal from 13-cv-00851), 14-5005 (Defendants' appeal from 13-cv-00881), 14-5016 (Plaintiffs' cross-appeal from 13-cv-00851) and 14-5017 (Plaintiffs' cross-appeal from 13-cv-00881). Case no. 14-5004 has been consolidated with 14-5016, and no. 14-5005 has been consolidated with 14-5017. Currently pending before the court is the Government's motion to consolidate the two sets of appeals, as well as the Plaintiffs-Appellees-Cross-Appellants' motion to strike and for sanctions. The Center is not aware of any other related cases.

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DISCLOSURE STATEMENT OF *AMICUS CURIAE*
PURSUANT TO CIRCUIT RULE 26.1

A. The Center is a project of the National Security Archive Fund, Inc., a tax-exempt organization. The Center does not have any parent companies. No publicly held company owns 10% or more of the stock of the National Security Archive Fund, Inc., or of the Center.

B. The Center is dedicated to the defense of civil liberties, human rights, and constitutional limits on government power. A principal concern of the Center is the prevention of illegal government surveillance. No members of the Center have issued shares or debt to the public.

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2014, I caused the foregoing Motion of the Center for National Security Studies for Leave to Participate as *Amicus Curiae* to be electronically filed via the Court's CM/ECF System, causing a true and correct copy to be served upon all counsel of record who are registered CM/ECF users.

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